SEE TEOW GUAN & ORS.

v.

KIAN JOO HOLDINGS SDN. BHD. & ORS.

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
SITI NORMA YAAKOB JCA
MOKHTAR SIDIN JCA
[CIVIL APPEAL NO: W-02-445-1995]
27 NOVEMBER 1995

COMPANY LAW: *Winding up - Petition - Power of Court - Whether can order distribution in specie of company's shares and investments at hearing of petition - Companies Act 1965, s. 221*

CIVIL PROCEDURE: *Stay of proceedings - Pending appeal - Grounds - Whether special circumstances a necessity - Whether consideration should be whether appeal, if successful, would be rendered nugatory - Courts of Judicature Act 1964, s. 44*

The appellants petitioned for the winding-up of the first respondent company ('the company'), of which the appellants and the other respondents were shareholders. One of the orders prayed for in the petition was for the distribution *in specie* of the company's shares and investments, pursuant to s. 221 of the Companies Act 1965 ('the said prayer'). The second to fourth respondents applied to the High Court to strike out the said prayer on the ground that a distribution *in specie* could not be granted by the Court at the hearing of the winding-up petition. The application was allowed and the said prayer struck out. The appellants appealed to the Court of Appeal and also applied for a stay of proceedings on the petition pending their appeal. At the hearing of this appeal, Counsel for the respondents informed the Court that the respondents would be consenting to the winding-up at the hearing of the petition.

Held:
Per Gopal Sri Ram JCA:

[1] Despite the rather wide wording of s. 221 which states that on hearing a winding-up petition the Court may, *inter alia*, make any interim or other order that it thinks fit, the only final order that a companies Court may make is either to direct a winding-up or to dismiss the petition. It cannot make an order as to the distribution or disposal of the assets of a company. That power is vested in the liquidator and not the Court.

[2] Under s. 44 of the Courts of Judicature Act 1964, the Court of Appeal may grant any order that can preserve the integrity of any appeal pending before it. It used to be that an appellant had to show 'special circumstances' warranting a stay of proceedings or of execution. However, a more practical and less stringent approach should be adopted so that the paramount consideration governing an application for a stay, or any other form of interim order, is that the appeal, if successful, should not be rendered nugatory.

[3] In the present case, it is clear from the authorities that the substantive appeal lacks all merit and is doomed to failure. Also, as the respondents were agreeable to the winding-up, the appellants would get their primary relief. The distribution *in specie* was a decision for the liquidator, against which either party could appeal to the Courts. As such, a stay should not be granted as it would only delay the disposal of the case, cause manifest injustice to all the parties and add to the Court's list. Furthermore, this being a winding-up petition, it ought to be prosecuted to a conclusion with all due speed.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

UNDANG-UNDANG SYARIKAT: *Penggulungan - Petisyen - Kuasa Mahkamah - Samada boleh memerintahkan pengagihan menurut jenis saham-saham dan pelaburan-pelaburan syarikat di perbicaraan petisyen - Akta Syarikat 1965, s. 221*

PROSEDUR SIVIL: *Penggantungan prosiding - Menantikan penyelesaian rayuan - Alasan-alasan - Samada keadaan-keadaan khas suatu keperluan - Samada balasan seharusnya, jika rayuan berjaya, akan dijadikan nugatori - Akta Mahkamah Kehakiman 1964, s. 44*

Perayu-perayu telah mempetisyen untuk penggulungan syarikat responden pertama ("syarikat tersebut"), bagi yang mana perayu-perayu dan responden-responden yang lain merupakan pemegang-pemegang saham. Salah satu perintah-perintah yang dipohon dalam petisyen tersebut adalah supaya pengagihan *in specie* dilakukan akan saham-saham dan pelaburan-pelaburan syarikat itu, selaras dengan s. 221 Akta Syarikat 1965 ("pohonan tersebut"). Responden-responden kedua hingga keempat telah memohon kepada Mahkamah Tinggi untuk membatalkan pohonan tersebut atas alasan bahawa pengagihan *in specie* tidak dapat diberikan oleh Mahkamah diperbicaraan petisyen penggulungan tersebut. Permohonan tersebut dibenarkan dan pohonan tersebut

telah dibatalkan. Perayu-perayu telah merayu kepada Mahkamah Rayuan dan juga memohon untuk mendapatkan penggantungan prosiding ke atas petisyen itu sementara menantikan rayuan mereka. Di perbicaraan rayuan ini, Peguam bagi pihak responden telah memaklumkan Mahkamah bahawa responden akan menyetujui penggulungan tersebut di perbicaraan petisyen itu.

Diputuskan:
Oleh Gopal Sri Ram HMR:

[1] Sungguhpun s. 221 meliputi kata-kata yang luas yang mana menyatakan bahawa ketika mendengar satu petisyen penggulungan Mahkamah boleh, antara lainnya, membuat sebarang perintah interim atau lain-lain perintah yang difikirkan sesuai, satu-satunya perintah muktamad yang sesebuah Mahkamah mungkin akan buat adalah samada untuk mengarahkan suatu penggulungan atau menolak petisyen tersebut. Ianya tidak boleh membuat perintah berhubung dengan pengagihan atau pelupusan aset-aset sesebuah syarikat. Kuasa itu diletak-hak pada penyelesai dan bukannya Mahkamah.

[2] Di bawah s. 44 Akta Mahkamah Kehakiman 1964, Mahkamah Rayuan boleh memberikan apa-apa perintah yang boleh mengekalkan kesempurnaan mana-mana rayuan yang menanti penyelesaian di hadapannya. Dahulu seseorang perayu terpaksa menunjukkan "special circumstances" yang mewajarkan suatu penggantungan prosiding atau penggantungan perlaksanaan. Walau bagaimanapun suatu pendekatan yang lebih praktikal dan tidak sebegitu ketat seharusnya diterima-pakai supaya pertimbangan penting yang menguasai sesuatu permohonan untuk penggantungan, atau apa-apa bentuk perintah interim yang lain, adalah bahawa rayuan itu, jika berjaya, tidak seharusnya menjadi nugatori.

[3] Dalam kes semasa ini, ianya jelas daripada autoriti-autoriti yang ada bahawa rayuan substantif itu ketiadaan merit langsung dan akan pasti gagal. Juga, oleh kerana responden bersetuju kepada penggulungan, perayu akan mendapat relif mereka. Pengagihan *in specie* adalah suatu keputusan bagi penyelesaian, terhadap yang mana, mana-mana satu pihak boleh merayu kepada Mahkamah. Oleh yang demikian, suatu penggantungan tidak seharusnya diberikan kerana ianya akan hanya melewatkan penyelesaian kes itu, menyebabkan ketidak-adilan yang nyata kepada kesemua pihak dan menambah senarai Mahkamah. Lagipun, sebagai satu petisyen penggulungan, ia sepatutnya diteruskan segera hingga mencapai keputusan.

[Rayuan ditolak.]

Cases referred to:
Re RJ Jowsey Mining Co. Ltd. [1969] 2 OR 549 ***(foll)***
The Annot Lyle [1886] 11 PD 114 ***(not foll)***
Serangoon Garden Estate Ltd v. Ang Keng [1953] MLJ 116 ***(not foll)***
Dickson Trading (S) Pte. Ltd. v. Transmarco Ltd. [1989] 2 MLJ 408 ***(foll)***
Mohamed Mustafa v. Kandasami (No. 2) [1979] 2 MLJ 126 ***(foll)***
Alexander & Ors. v. Cambridge Credit Corporation Ltd. & Anor. [1985] 10 ACLR 42 ***(foll)***
Re Calicut Bank Ltd, [1938] 8 Comp. Cas. 313 ***(foll)***
Re Metropolitan Railway Warehousing Co. Ltd. [1867] 17 LT 108 ***(foll)***

Legislation referred to:
Companies Act 1965, s. 221
Corporations Act 1960 [Canada], 258
Courts of Judicature Act 1964, s. 44
Insolvency Act 1986 [UK], s. 125(1)

Other source referred to:
Applications to Wind Up Companies, Derek French, p. 130

[Appeal from High Court Malaya, Kuala Lumpur; Companies Winding-up No: D4-28-294-94]

For the appellants - Izabella de Silva; M/s. Iza, Ng Yeoh & Kit
For the 2nd, 3rd & 4th respondents - T. Thomas (Charanjeet Kang with him); M/s. Skrine & Co.

JUDGMENT

Gopal Sri Ram JCA:

The appellants, on 10 September 1994 presented a petition before the Commercial Division of the High Court at Kuala Lumpur to wind-up the first respondent of which they are shareholders. So are the other respondents. The appellants' petition, which is based, *inter alia*, on the just and equitable ground, contained the following prayers:

(1) For an order that the company may be wound-up by the Court under the provisions of s. 218(f) and/or (i) of the Companies Act 1965.

(2) or that such other order be made in the premises as shall be just.

(3) that costs of this petition be borne by the second, third and fourth respondents.

(4) For an order pursuant to s. 221 of the Companies Act 1965:

(a) that there be a distribution *in specie* of shares and investments.

(b) that **See Teow Chuan** render a proper account of the dealings in the shares, investment and the funds belonging to the company including the shares fraudulently misappropriated by him.

(c) restraining the company (whether by its officers, servants or agents or otherwise whatsoever) from proceeding with or holding the extraordinary general meeting of the company scheduled to be held on 21 September 1994.

(d) restraining the second, third and fourth respondents from voting at the extraordinary general meeting of the company scheduled to be held on 21 September 1994.

On 11 November 1994 the second, third and fourth respondents took out a motion in the petition to strike out prayer 4(a) on the ground that it was plain and obvious that the relief claimed therein could not be granted by the Court at the hearing of a winding-up petition. The learned Judicial Commissioner who heard the motion acceded to it and struck out the offending prayer. Against this the appellants have appealed. The appeal is at present pending before this Court. In the meantime, the learned Judicial Commissioner, quite properly, proceeded to fix the petition for hearing. The appellants took the view that if the petition was proceeded with before their appeal was heard and determined they would suffer prejudice. They accordingly moved this Court for a stay of all proceedings on the petition pending the hearing and disposal of their appeal. That application came on for hearing before this Court on 20 November 1995. After hearing the arguments of deSilva who moved the application and T. Thomas who opposed it this Court formed the unanimous view that a stay ought not to be granted. The appellants' application was therefore dismissed with costs.

I was initially not inclined to deliver written reasons for the decision arrived at. But for reasons that will appear shortly, I have come to the conclusion that a reasoned judgment is necessary in this case.

When Counsel for the appellants opened her argument on the application, she submitted that a stay ought to be granted because the question of law which arose in the appeal was one of first impression. She said that the point had not been considered or decided upon by any Court in the Commonwealth so that there was no authority going one way or the other. The appeal was therefore arguable and there ought to be a stay in order not to render it nugatory. Thomas when he came to oppose the application also advised the Court that there was no authority on the point. In the course of argument by Counsel, I had also observed that my limited researches, in the time made available, had not produced any authority. However, my later researches have

in fact shown that there is concluded authority on the point and that it lies against the appellants. This discovery has necessitated the delivery of written reasons in this case.

In order to understand the point made by Counsel, it is necessary to appreciate what this case concerns. It has to do with the power of a companies Court when hearing a winding-up petition. That power is to be found in s. 221 of the Companies Act 1965 ('the Act') and so far as it affects this case, is more particularly to be found in the first subsection. For completeness, I produce below, the whole of s. 221 of the Act. It reads as follows:

> 221(1) **On hearing a winding-up petition the Court may** dismiss it with or without costs or adjourn the hearing conditionally or unconditionally, or **make any interim or other order that it thinks fit** but the Court shall not refuse to make a winding-up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets or that the company has no assets or in the case of a petition by a contributory that there will be no assets available for distribution amongst the contributories.
>
> (2) The Court may on the petition coming on for hearing or at any time on the application of the petitioner, the company, or any person who has given notice that he intends to appear on the hearing of the petition:
>
> (a) direct that any notices be given or any steps taken before or after the hearing of the petition;
>
> (b) dispense with any notices being given or steps being taken which are required by this Act, or by the rules, or by any prior order of the Court;
>
> (c) direct that oral evidence be taken on the petition or any matter relating thereto;
>
> (d) direct a speedy hearing or trial of the petition or any issue or matter;
>
> (e) allow the petition to be amended or withdrawn; and
>
> (f) give such directions as to the proceedings as the Court thinks fit.
>
> (3) Where the petition is presented on the ground of default in lodging the statutory report or in holding the statutory meeting, the Court may instead of making a winding-up order, direct that the statutory report shall be lodged or that a meeting shall be held and may order the costs to be paid by any persons who, in the opinion of the Court, are responsible for the default. (Emphasis added.)

The point that forms the axis of the dispute between the parties lies in the words of s. 221(1) upon which I have laid emphasis. To put it in clearer terms, it is the appellants' contention that their appeal has merits because s. 221(1)

empowers the Court hearing a winding-up petition to make any interim **or other order**. It follows that the appellants, as petitioners, are entitled to move the Court for an order that the assets of the first respondent be distributed *in specie* among the shareholders. The appellants' claim for the relief in the offending prayer is therefore not plainly unsustainable, so the argument goes, and ought not therefore to have been struck out.

Now, authority apart, I thought that rather odd because the power to deal with the assets of a company on a winding-up is vested in the liquidator and not in the Court. Upon the first respondent being wound-up, it is always open to the appellants to apply to the liquidator to distribute the assets of the company *in specie* among the contributories. Of course he may or may not accede to that request: for he may consider a sale to be more appropriate. But if the appellants, as contributories are dissatisfied with his decision they may approach the Court on a summons to review it. I cannot but think that this is commonplace in the sphere of company law. In fact, when I put this to Counsel for the appellants, she readily agreed that this course was always open to her clients.

I must confess that, despite the rather wide words appearing in s. 221(1) of the Act, the only **final** order a companies Court may make is either to direct a winding-up or to dismiss the petition. It may certainly make interim orders, e.g., by appointing a provisional liquidator or a receiver and manager pending the final disposal of the petition. But, as I have said, it is not my comprehension of the law governing the winding-up of companies that a Court hearing a petition may make an order as to the distribution or disposal of the assets of a company. And, as I have since discovered, the point is covered by authority.

In a textbook entitled "*Applications to Wind up Companies*" which is a work by Derek French, there appears the following commentary (at p. 130) on the Court's powers under s. 125(1) of the Insolvency Act 1986, of the United Kingdom which, for present purposes, is *in pari materia* with s. 221(1) of the Act:

> The power given to the Court by s. 125(1) to make an interim or other order is limited to making ancillary orders in furtherance of or otherwise in connection with a present or prospective winding-up order: the subsection does not empower the Court to order some remedy other than winding-up (*Re R.J. Jowsey Mining Co. Ltd.* [1969] 2 OR 549; *Re Humber Valley Broadcasting Co. Ltd.* [1978] 19 Nfld & PEIR 230; *Rafuse v. Bishop* [1979] 34 NSR (2d) 70 at pp. 82-3; *Maldon Minerals NL v. McLean Exploration Services Pty. Ltd.* [1992] 9 ACSR 265). The Court is, however, empowered to adjourn a winding-up application and give directions and order that if its directions are not followed then a winding-up order will be made (*Re R.J. Jowsey Mining Co. Ltd.* [1969] 2 OR 549).

In *Re R.J. Jowsey Mining Co. Ltd.* (*supra*), the Ontario Court of Appeal had to consider the powers of a companies Court under s. 258 of the Corporations Act 1960 of that province which was in the following terms:

> 258. The Court may make the order applied for, may dismiss the application with or without costs, may adjourn the hearing conditionally or unconditionally or may make any interim or other order as is deemed just, and upon the making of the order may, according to its practice and procedure, refer the proceedings for the winding up and may also delegate any powers of the Court conferred by this Act to any officer of the Court.

Laskin JA, with whom MacKay JA agreed, when considering the effect of the identical phrase "or other order" appearing in the section said:

> The orders ('interim or other order as is deemed just') which may be made under s. 258 on a winding-up application (short of dismissal of the application) are ancillary orders, referable to a winding-up and **which may result ultimately in dismissal or granting of the application according to whether the terms of such ancillary orders are or are not observed**. I do not read s. 258 as empowering the Court to stay a winding-up application and introduce an entirely independent remedy that will operate outside of a prospective winding-up. (Emphasis added.)

No clearer interpretation of the phrase relied upon by the appellants is necessary. There is, in the passage cited, sufficient confirmation of the absence of a power wider than that which a companies Court has always been understood to have when hearing a winding-up petition. The question that remains for determination is, whether, in the light of what has been said, there ought to be a stay of the hearing of the winding-up petition.

The power of this Court to grant a stay of execution or a stay of proceedings is to be found in s. 44 of the Courts of Judicature Act 1964 which is in the following terms:

> 44(1) In any proceeding pending before the Court of Appeal any direction incidental thereto not involving the decision of the proceeding, any interim order to prevent prejudice to the claims of parties pending the hearing of the proceeding, any order for security for costs, and for the dismissal of a proceeding for default in furnishing security so ordered may at any time be made by a Judge of the Court of Appeal.
>
> (2) Every application under subsection (1) shall be deemed to be a proceeding in the Court of Appeal.
>
> (3) Every order so made may be discharged or varied by the full Court.

This provision confers ample jurisdiction upon this Court to grant any order that will have the effect of preserving the integrity of any appeal pending before it. Whether such an order ought to be granted and the terms on which it may be granted are entirely within the discretion of this Court.

At one time it was thought that an appellant had to demonstrate that there were special circumstances warranting a stay of proceedings or of execution. This was founded on the notion that a successful litigant ought not to be deprived of the fruits of his litigation. See, *The Annot Lyle* [1886] 11 PD 114. The authority constantly relied upon in support of the proposition that special circumstances ought to be demonstrated before a stay of execution may be granted is the judgment of Brown J in *Serangoon Garden Estate Ltd. v. Ang Keng* [1953] MLJ 116. For my part, having considered the more recent authorities on the subject, I have come to the conclusion that that decision is bad law and ought no longer to be followed by this Court.

In *Dickson Trading (S) Pte. Ltd. v. Transmarco Ltd.* [1989] 2 MLJ 408, 415, Chan Sek Keong JC, jettisoned the Serangoon Garden test for reasons that are so well argued that I shall quote from his judgment *in extenso.* This is what he said:

> In this application, Counsel for the plaintiffs relied on the well-known authority of *Erinford Properties Ltd. & Anor. v. Cheshire County Council* [1974] Ch. 261 and contended if a limited injunction was not granted, the plaintiffs' appeal, if successful, would be rendered nugatory by the defendants and the Tays taking immediate steps to complete the transaction. It was suggested that the grant of a limited injunction would cause the defendants and the Tays no inconvenience as they had provided for the contingency of an appeal by having mutually agreed to release each other from completing the sale if any injunction were not lifted by June 1988.
>
> Counsel for the defendants and the Tays advanced two arguments against the grant of a limited injunction. First, that it was not sufficient that the plaintiffs could not be restored to their (*sic*) original position: there must also be other grounds, e.g., that there were merits in the appeal. Reference was made to *Serangoon Garden Estate Ltd. v. Ang Keng* [1953] MLJ 116 and *Syarikat Berpakat v. Lim Kai Kok* [1983] 1 MLJ 406 as authorities for the proposition. Then it was argued that since the Court had held that there was no serious issue to be tried, it must therefore follow that the plaintiffs' case had no merit and that it was frivolous and vexatious. Reference was made to (a) *Erinford Properties* where Megarry J said (at p. 268):
>
> > There will, of course, be many cases when it would be wrong to grant an injunction, pending appeal, as where any appeal would be frivolous, or to grant the injunction would inflict greater hardship than it would avoid and so on. But, subject to that, the principle is that to be found in the leading judgment of Cotton LJ in *Wilson v. Church (No. 2)* ... .

and (b) *American Cyanamid* [1975] AC 396 where Lord Diplock said (at p. 417):

> The Court ... must be satisfied that the claim is not frivolous and vexatious; in other words, that there is no serious question to be tried.

I do not agree with these submissions (*sic*) of Counsel for the defendants and the Tays. Both the *Serangoon Garden* case and the *Syarikat Berpakat* case concerned applications for stay of execution of final judgments after full trials. The present application was in effect a stay of an interlocutory order. In my view, there is a difference in substance and not merely in degree between the two situations. Further, I am also of the view that the decision of Brown J was wrong. In that case, the respondent was not represented and only Counsel for the appellant (against an order granting a stay) argued the point. No authority has been cited in the judgment. These two decisions are inconsistent with the general principle applied in the authorities cited in 1985 *Supreme Court Practice* para. 59/13/1 and in *Wilson v. Church (No. 2)* [1879-80] 12 Ch. D. 454, where Cotton LJ (at p. 458) said:

> when a party is appealing, exercising his undoubted right of appeal, this Court ought to see that the appeal, if successful, is not nugatory.

Brett LJ was even more emphatic. His Lordship said:

> ... the Court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful, from being nugatory ... That rule must be acted upon unless this is an exceptional case.

> In my view, the likelihood of an appeal, if successful, being rendered nugatory, is a sufficient ground for a stay of execution. I am also of the opinion that the exceptions laid down by Megarry J for denial of a limited injunction are no longer applicable under the new regime established by *American Cyanamid* as they have the effect of negating the Court's jurisdiction to grant a limited injunction where it has refused an interlocutory injunction on the ground either that there is no serious issue to be tried (i.e. the action is frivolous and vexatious) or that the balance of convenience is in favour of the other party. I do not accept that the decision in *American Cyanamid* was intended to limit or had the effect of limiting the jurisdiction of the Court to grant a limited injunction in such cases.

For my part, I am unable to see any good reason for our Courts to cling on to a legal test which has been repudiated, for good reasons, by the Courts of the jurisdiction from which that test emanated. In any event, I find that there is respectable authority in our own jurisdiction that points to a more practical and less stringent approach to the problem.

Thus, in *Mohamed Mustafa v. Kandasami (No. 2)* [1979] 2 MLJ 126, 127, Abdul Hamid J (later Lord President and Chief Justice of the Federal Court) in summing-up the law governing applications for stay of execution which, in my judgment, are of equal relevance to an application for a stay of proceedings said:

> On the question of stay of execution it is I think settled law that the granting of such a stay is a matter of the Court's discretion, and it is true that the exercise of such discretion must be founded upon established judicial principles. **One of the determining factors that calls for consideration is whether by not making an order to stay the execution it would make the appeal if successful, nugatory in that it would deprive an appellant of the results of the appeal.** How pertinent that factor would be may vary according to the circumstances of each particular case.
>
> In the instant case it is the considered judgment of this Court that the respondent ought to be granted stay of execution to maintain the status quo so as not to deprive him, if successful, the result of his appeal. (Emphasis added.)

The jurisprudential basis for the move away from the stricter view that had earlier prevailed to a more flexible and realistic approach appears in *Alexander & Ors. v. Cambridge Credit Corporation Ltd. & Anor*. [1985] 10 ACLR 42, a decision of the Court of Appeal of New South Wales. Kirby P, when delivering the judgment of the Court said (at p. 48):

> In order to consider whether a stay should be granted in the present case, it is appropriate to refer to the principles, suggested by earlier cases, concerning the granting of a stay pending appeal. In a number of cases, including recent pronouncements of this Court, it has been said that a judgment creditor is entitled to the 'fruits of his victory' unless the appellant can show 'special' or 'exceptional' circumstances which warrant the imposition of a stay. This principle is often traced to the *The Annot Lyle* [1886] 11 PD 114. It has been expressed in many cases, including recently in this Court and in the Full Court of the Supreme Court of Victoria: see *Monk v. Bartram* [1891] 1 QB 346; *Klinker Knitting Mills Pty. Ltd. v. L'Union Fire Accident & General Insurance Co. Ltd.* [1937] VLR 142; *Scarborough v. Lew's Junction Stores Pty. Ltd.* [1963] VR 129; *Bridges v. Australian Consolidated Press Ltd.,* unreported, Court of Appeal, 16 June 1970; *Trlin & Ors. v. Marac Finance Australia Ltd.,* unreported, *op. cit.*; cf *Noulikas Holdings Pty. Ltd. v State Insurance Office,* unreported, Full Court, Supreme Court of Victoria, 22 March 1985; [1985] VJB 31.
>
> There are three reasons why it is appropriate to reconsider this formulation of the test for the grant of stays pending appeal. First, there is no suggestion in the rule that 'special' or 'exceptional' circumstances must be established before the discretion conferred upon the Court will be exercised. This is significant because, where the Act or the Rules contemplate the need for special or exceptional circumstances to warrant a particular course they generally say so. For example the very next rule (Pt. 51 r. 11) dealing with security for costs of an

appeal says, in terms, that such an order may be made 'in special circumstances'. No such limitation appears in Pt. 51 r. 10. Cf. also s. 75A of the Supreme Court Act 1970 (NSW). If it had been contemplated that 'special circumstances' were required or that 'exceptional circumstances' should be established to attract the discretion to grant a stay pending appeal, it might have been supposed that the legislature would have said so in terms. The absence of such a provision implies, at least in the practice of this Court, that no such requirement exists.

Secondly, the principle and the like expression of it in *Barker v. Lavery* [1885] 14 QBD 769 and in *Monk v. Bartram* first appear in decisions of the Courts when the facility of appeal, which was not generally available at common law, was still relatively novel. In these circumstances the Courts might more readily look upon appeals as an exceptional process. Today this is not the case. Far from being exceptional, appeals are common. Particularly is this so in commercial matters, where large sums are at stake. Appeal Courts are enjoined, statute apart, to weigh competing inferences from the proved or accepted facts, and even where the credibility of witnesses is involved, to consider whether the advantages of the trial Court may not be outweighed by compelling inferences to be drawn from the evidence proved: *Voulis v. Kozary & Ors.* [1976] 50 ALJR 59. Where facts are undisputed or, though disputed, are established by the finding of the trial Judge, the appellate Court is said to be in as good a position as the trial Judge to decide the proper inferences to be drawn from those facts. Though the appeal Court will give respect and weight to the conclusion of the trial Judge, once having reached its own conclusion, it must not shrink from giving effect to it. This principle was established immediately after the introduction of the facility of appeal by the Judicature Act 1873 (Imp): see e.g. *The Glannibanta* [1875-6] 1 PD 283 at 287-8. Although it was for a time eclipsed (see e.g. *Watt v. Thomas* [1947] AC 484 at 487 and *Edwards v. Noble* [1971] 125 CLR 296), it was soon re-established in England: see *Benmax v. Austin Motor Company Ltd.* [1955] AC 370 at 376 and later in Australia: see *Warren v. Coombes & Anor.* [1979] 142 CLR 531 at 551; *Taylor & Ors. v. Johnson* [1983] 151 CLR 422 at 426. These modern duties of appellate Courts, or at least of this Court, involve a historic change in the facility of appeal, particularly when compared to the position in the late nineteenth century when such facility was doubtless still considered by some Judges to be novel, so that they were reluctant to interfere with verdicts by granting stays.

Thirdly, recent decisions of this Court, reflecting the language of the rules and the frequency and nature of appeals, have expressed the approach to be taken without reference to the need for 'special' or 'exceptional' circumstances to justify a stay. Thus in *Waller v. Todorovic & Anor. op. cit.* at 3, the Court merely pointed to the need for the party seeking a stay to establish a reason therefor. To like effect is the judgment of Mahoney JA (with whom Moffitt P and Glass JA agreed) in *Re Middle Harbour Investments Ltd. (in liq),* unreported, Court of Appeal, 15 December 1976. In that case, Mahoney JA said this:

> Where an application is made for a stay of proceedings, it is necessary that the applicant demonstrate an appropriate case. *Prima facie*, a successful party is entitled to the benefit of the judgment obtained by him and is entitled to commence with the presumption that the judgment is correct. These are not matters of rigid principle and a Court asked to grant a stay will consider each case upon its merits, but where an applicant for a stay has not demonstrated an appropriate case but has left the situation in the state of speculation or of mere argument, weight must be given to the fact that the judgment below has been in favour of the other party.

Although it is true that, in a number of more recent decisions of the Court, reference has been made to the requirement of 'exceptional' and 'special' circumstances, and although the same requirement appears still to be observed in Victoria, the general practice of the Court conforms more closely to that stated by Mahoney JA. *In our opinion it is not necessary for the grant of a stay that special or exceptional circumstances should be made out. It is sufficient that the applicant for the stay demonstrates a reason or an appropriate case to warrant the exercise of discretion in his favour.*

There are other principles to be kept in mind. The onus is upon the applicant to demonstrate a proper basis for a stay that will be fair to all parties: *Trlin*, above. The mere filing of an appeal will not, of itself, provide a reason or demonstrate an appropriate case, nor will it discharge the onus which the applicant bears. See Supreme Court Rules, Pt. 51 r. 10; *Waller v. Todorovic*. The Court has a discretion whether or not to grant the stay and, if so, as to the terms that would be fair. In the exercise of its discretion, the Court will weigh considerations such as the balance of convenience and the competing rights of the parties before it: *The Attorney-General v. Emerson & Ors.* [1889] 24 QBD 56. Where there is a risk that if a stay is granted, the assets of the applicant will be disposed of, the Court may, in the exercise of its discretion, refuse to grant a stay cf *Clyne v. Deputy Commissioner of Taxation* [1982] 56 ALJR 857. Sometimes as a condition of the grant of a stay, where funds are available, a Court will impose on the applicant the payment of the whole, or part, to the judgment creditor: *Andrews & Anor. v. John Fairfax & Sons Ltd.* [1979] NSWLR 184. Even where no order is made for the payment of part of a verdict, it is not at all unusual for the Court, in the exercise of its discretion, to grant a stay on terms that the appellant give to the judgment creditor security in terms defined by the Court as appropriate to the fair adjustment of the rights of the parties. This is what was done in *Trlin & Ors. v. Marac Finance Australia Ltd.*, above. In that case, as a condition of the continuance of a stay of execution of judgment, the Court ordered the applicant to pay into a joint trust account, jointly administered by the solicitors for the parties, a sum equivalent to the interest payable under the mortgage, the subject of dispute, such sum (and the further payments falling due under a disputed mortgage pending the determination of the appeal) to be held on trust and thus available to disposition by order of the Court on the conclusion of the

appeal. The object of this order was clearly, in recognition of the fact that the stay would deprive the judgment creditor of the fruits of the judgment, to protect it and, by the accumulation of interest, to compensate it for the delays in recovery.

Two further principles can be mentioned. The first is that **where there is a risk that the appeal will prove abortive if the appellant succeeds and a stay is not granted, Courts will normally exercise their discretion in favour of granting a stay**: *Scarborough v. Lew's Junction Stores Pty. Ltd. op. cit.* at 130 applied in *Sun Alliance Insurance Ltd. v. Steiger*, unreported, Full Court, Supreme Court of Victoria; 22 March 1985; [1985] VJB 17. **Thus, where it is apparent that unless a stay is granted an appeal will be rendered nugatory, this will be a substantial factor in favour of the grant of a stay**: *Wilson v. Church (No. 2)* [1879] 12 Ch. D. 454; *Re Middle Harbour Investments Ltd. (in liq)*, above at 2. *Secondly, although Courts approaching applications for a stay will not generally speculate about the appellant's prospects of success, given that argument concerning the substance of the appeal is typically and necessarily attenuated, this does not prevent them considering the specific terms of a stay that will be appropriate fairly to adjust the interest of the parties, from making some preliminary assessment about whether the appellant has an arguable case.* This consideration is protective of the position of a judgment creditor where it may be plain that an appeal, which does not require leave, has been lodged without any real prospect of success and simply in the hope of gaining a respite against immediate execution upon the judgment. Where, in the present case, Rogers J specifically contemplated in his judgment that an appeal would be lodged; where commentators on the judgment predicted a certain appeal: see e.g. R. Baxt, 'Comment' [1985] 13 ABLR 154 at 160; where the size of the verdict and the novelty of the issues raised suggested the likelihood of an appeal; and where it is properly conceded by the claimant that the appeal is arguable, no question arises relevant to the stay or to the terms upon which it should be granted, that the appeal has been filed simply to gain time for the opponents. (Emphasis added.)

In my judgment, the paramount consideration governing an application for a stay, whether of execution or of proceedings, or, in the case of an application for some other form of interim preservation of the subject-matter of an appeal, such as the grant of an injunction or other appropriate relief under s. 44(1) of the Courts of Judicature Act 1964, is that the appeal to this Court, if successful, should not be rendered nugatory. If upon balancing all the relevant factors, this Court comes to the conclusion that an appeal would be rendered nugatory without the grant of a stay or other interim preservation order, then, it should normally direct a stay or grant other appropriate interim relief that has the effect of maintaining the status quo.

But cases may arise where, in determining the critical question whether an appeal would be rendered nugatory, this Court comes to the conclusion that the point concerned in the pending appeal is obviously unarguable. In such

cases it would not, as I perceive the law, be a proper exercise of discretion for this Court to shut its eyes to the practical realities of the situation and to nevertheless proceed to grant a stay.

Take this very case. It is clear from the authorities that the substantive appeal, based upon a single point of interpretation, lacks all merit and is doomed to failure. In this state of affairs, would it be a proper exercise of discretion to permit a stay and cause a delay in the prosecution of the petition? I think not. Apart from the absence of merits there are other reasons as well.

Thomas informed this Court that his instructions are to consent to a winding-up order at the hearing of the petition. Indeed, the second respondent has, in para. 4 of the affidavit filed in opposition to the motion, explicitly confirmed this. So, this is not a case where there will be a bitter opposition to the winding-up of the first respondent. To delay the hearing and disposal of such a case as this will, in my judgment, cause a manifest injustice to the parties. It will also put the list of the commercial Court in hopeless disorder.

There is the added consideration that this is a winding-up petition which, on authority, ought to be prosecuted to a conclusion with all due speed.

In *Re Calicut Bank Ltd.* [1938] 8 Comp. Cas. 313, 314, Leach CJ when hearing an appeal against the refusal of an adjournment of a winding-up petition for the purpose of considering a scheme of arrangement said:

> There is no reason why the application for winding-up should not be considered by the Court. In fact it should be considered at the earliest possible moment. Even if an order for winding-up is passed, it will not interfere with any proper scheme being considered.

The rationale for an expeditious resolution of the outcome of a winding-up petition was given in *Re Metropolitan Railway Warehousing Co. Ltd.* [1867] 17 LT 108, 111, where Lord Cairns said:

> I am averse to adjourning or suspending the petition for this reason: that I think it is always a very inconvenient thing for a company to have a pending petition for a winding-up order hanging over their heads. I think that the Court should, as far as possible, either make an order upon the petition for the winding-up of the company, if it is a fit case, or if not dismiss the petition. There are many cases in which it cannot be done; but where it can be done I think that is the better course, and the more so because it is well known that if the petition is adjourned, it is adjourned with this consequence imminent over the company: if the winding-up order is made, the winding-up would, date back to the presentation of the petition, and avoid therefore, or imperil, anything that was done by the company in the mean time. I think that the better course is to dismiss this petition.

I am convinced that it would, in the face of the judicial pronouncements which I have referred to, be a poor exercise of discretion to grant a stay in this case. What good will come of it? None, as far as I can see.

The appellants will not suffer any prejudice. They want the first respondent to be wound-up. The other respondents are agreeable to that course. So they will get their primary relief. They want the assets of the first respondent company to be distributed *in specie*. That, as I have said, is a matter over which the High Court has no jurisdiction at the hearing of the appellants' petition. But the appellants have, as I earlier observed, the right to raise this with the liquidator. He may or may not agree with the request. Either way, the party who is dissatisfied with the decision of the liquidator is entitled to raise the matter on a summons taken out before a Judge of the High Court. He may affirm, vary or set aside the liquidator's decision. A further appeal against his decision lies to this Court.

As against all this is to be weighed the consequences of granting a stay in this case. There is no doubt that the effect of such an order would be to prolong the disposal of what in essence is a simple matter. There will be a delay of several months while awaiting the hearing of an appeal that is bound to fail. Ultimately, after the passage of many wasted months, the petition will be heard unopposed and the first respondent will be wound-up. When viewed in this way, it is not difficult to see where the justice of the case lies.

Accordingly, in the light of the circumstances presented to this Court, I am of the view that the appellants' application for a stay should not granted. It was therefore dismissed with costs. A consequential order was made directing an early hearing and disposal of the petition.

My learned sister Siti Norma Yaakob has seen this judgment in draft and agrees with the reasoning and the conclusions therein.

Reported by Anne Khoo